Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 88-715

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER 1988 TERM

FORREST H. BURLESON,

Appellant

vs.

JACQUELINE D. BURLESON,

Appellee

On Appeal from the Court of Appeal
of California
Third Appellate District

MOTION TO DISMISS THE APPEAL

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Attorney for Appellee

January 31, 1989

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Appellee requests that the Court dismiss the appeal because it is based on issues which have already been decided by the Court and thus do not present a substantial federal question.

I

STATEMENT OF FACT

Appellant's statement of fact is incorrect as follows:

1. Appellee does contest that all property had been disposed of by written agreement (Jurisdictional Statement, page 4).

2. Appellant did not receive 100% (or any %) of the pension pursuant to the marital settlement agreement (Jurisdictional Statement, page 5). The pension was not mentioned nor divided in said agreement.

3. The trial court did not award Appellee 49% of Appellant's future and

unearned pay (Jurisdictional Statement, page 5). It awarded 49% to wife of the retirement already earned after 20 years of service.

II

THE JURISDICTIONAL ISSUES

The issues raised deal with federal law and in that respect the Supreme Court has jurisdiction.

However, federal law has already decided the questions raised in the Jurisdictional Statement and no new issues have been raised.

The federal law already establishes that the state court may treat a military service member's retirement pay as community property; (The Former Spouses' Protection Act (FUSFSPA) Section 1408, subdivision (c)(1)) states:

> "A court may treat disposable retired pay or retainer pay to a member for pay periods beginning after June 25, 1981,

> either as property of the member or as the property of the member and his spouse in accordance with the law of the jurisdiction of such court..."

This law sets June 25, 1981 as the date for allowing state courts the right to divide the pension only because this is the date the McCarty decision was rendered. (McCarty v. McCarty, (1981) 453 U.S. 210 (69 L.Ed.2d 589).

Neither the Supreme Court nor Congress have before June 19, 1981 held that the military pension is not divisible by the states, the law in effect before McCarty was being re-instated by FUSFSPA.

In the present case the trial court applied the law in existence at the time the parties' separated. Said law was that the pension is a community property asset, divisible upon separation as any

other asset. FUSFSPA was not given retroactive effect.

The pension vested in 1973 when Appellant retired and started to receive the pension. The parties were divorced in 1975. Clearly the asset was, in 1973 and in 1975, a community property asset subject to division under federal and state law.

The federal law before McCarty let the states divide the pension and such division was not found to be unconstitutional under any law or case. The status and charaterization of the pension before McCarty was thus clearly established and no substantial federal question is involved.

The status and characterization of the pension after McCarty is established by FUSFSPA. If there are constitutional problems with FUSFSPA, they do not per-

tain to this present case. California's law in 1973 was (and still is) that a vested military pension is community property. Said pension may be divided at a later time, after the divorce, and only under certain circumstances.

The issue that the states are pre-empted from recharacterizing the pay as a pension benefit has already been resolved by the United States Supreme Court. California's characterization was not overruled in the McCarty case. (McCarty v. McCarty, 453 U.S., page 223 (69 L.Ed. 2d., page 600).

The questions of the constitutionality of California Civil Code 4303.3, of impairment of employment contracts, and of California subject matter jurisdiction, have all been decided in prior cases against Appellant and through the enactment of FUSFSPA Appellant's arguments have again been rejected.

III

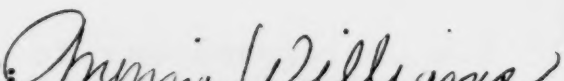
CONCLUSION

Appellee had a community property interest in the pension before FUSFSPA and she certainly cannot lose it because FUSFSPA has been enacted. There are no new issues in this case.

DATED: January 31, 1989.

Respectfully submitted,

WILLIAMS AND WILLIAMS

BY: 

MINNA WILLIAMS
Attorney for Appellee
Jacqueline D. Burleson

CERTIFICATE OF SERVICE

I, MINNA WILLIAMS, as a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of January, 1989, I served copies of the foregoing MOTION TO DISMISS THE APPEAL on the several parties thereto, as follows:

1. The Attorney General of the State of California, 1515 K Street, Sacramento, California 95814.

2. The United States Attorney, 3305 Federal Building, 650 Capitol Mall, Sacramento, California 95814.

3. Loretta H. Hellen, Attorney at Law, 3101 First Avenue, Sacramento, California 95817 (Counsel for Appellant, Forrest H. Burleson).

As a result of the foregoing, all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct and executed this 31st day of January, 1989 at Marysville, California.

MINNA WILLIAMS